United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1422

IN THE

United States Court of Appeals

For The Second Circuit

No. 76-1422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

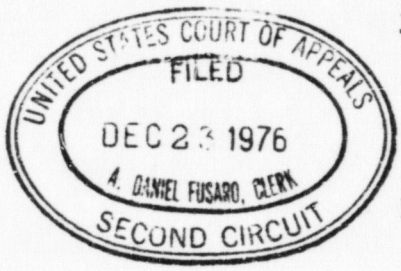
v.

FRANK CARUSO, MICHAEL DiRIENZO, EMIL ANNATONE, ROBERT D'ADDARIO, JOSEPH MESSINA and MICHAEL DITURI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANTS FRANK CARUSO and EMIL ANNATONE



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1422

UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

-against-

FRANK CARUSO
EMIL ANNATONE ET AL,

Defendants-Appellants.

BRIEF FOR THE APPELLANTS
FRANK CARUSO & EMIL
ANNATONE

Preliminary Statement

The appellants, Frank Caruso and Emil Annatone appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Pollack, J.), adjudging them guilty of one count of violating Title 18, United States Code, Sections 1955 and 2 which relate to unlawfully,

wilfully and knowingly financing, managing, supervising and directing an illegal gambling business. As a result of this conviction the appellant Frank Caruso was sentenced to the custody of the Attorney General for a period of one year to be followed by a three year probationary period and a fine of $2,000. The appellant Emil Annatone was sentenced to the custody of the Attorney General for a period of four months to be followed by a three year probationary period and a fine of $2,000. Both appellants are presently at liberty on bail pending appeal.

STATEMENT OF THE FACTS

This case involved a multi-defendant indictment which alleged that the appellants, and other named defendants, conspired to unlawfully conduct, finance, supervise, etc. an illegal gambling business (A15-19).[1/] The evidence which the Government proposed to offer had there been a trial of this indictment evolved from

1/ The letter "A" indicates reference to appellants appendix.

a series of State and Federal wiretaps. (A20-305)

Apparently sometime in 1973 the Public Morals Division of the New York City Police Department began an investigation into illegal gambling activity. (A-20) In order to pursue the goals of their investigation they applied for and obtained a series of court ordered eavesdropping warrants. Typical with an investigation of this genre, the original eavesdropping installations provided information which apparently encouraged law enforcement officials to seek additional wiretaps as the expanding scope of the investigation took form.

In early 1974 agents of the Federal Bureau of Investigation entered the ongoing State investigation and from that point on it became a joint Federal and State venture. (A-488) As Federal officials became more deeply involved they, too, sought and obtained court ordered eavesdropping warrants. (A-161, 216,254,310) In all, this case concerns 12 eavesdropping orders. Eight of these warrants were obtained pursuant to Article 700 of the New York Criminal Procedure Law

and authorized by Judges of the State of New York. The remaining four eavesdropping orders were obtained pursuant to 18 U.S.C. 2510, et. seq. and were authorized by, in each case, a Federal District Court Judge of the Southern District of New York.

In addition to obtaining eavesdropping warrants in pursuit of their investigation, Federal law enforcement officials also sought and obtained search warrants for various premises which they suspected were being utilized to conduct illegal gambling activities. (A-351-364)

On June 22, 1976, pursuant to omnibus motions brought on to controvert and suppress evidence derived from electronic surveillance, a hearing was had before the Honorable Milton Pollack (FDCJ, SDNY). Essentially, two claims were raised by counsel below. Firstly, that all subject wiretaps, and the derivative fruits thereof, should be suppressed on the grounds that they were either untimely sealed[2/]

2/ Both Article 700.50(2) of the New York Criminal Procedure Law and Section 2518(8)(a) of Title 18 provide that immediately upon the expiration of an eavesdropping order the recordings made therefrom must be taken before the Judge issuing such order and sealed under his direction.

or that they were predicated upon probable cause obtained from tapes which were untimely sealed. Secondly, defendants claimed that the law enforcement officials who had obtained these wiretaps had not sufficiently satisfied the requirements of 18 U.S.C. 2518(1)(c) (or with respect to the State wiretaps Section 700.20(2)(d) of the CPL), to wit: that they had failed to show that normal investigative procedures had been tried and were not successful, or that such procedures reasonably appeared to be unlikely to succeed if tried or to be too dangerous.

In this regard the District Court was invited to compare the affidavits of FBI agent Julius J. Bonavolonta submitted in support of applications for both Federal eavesdropping orders as well as applications for physical search warrants. It was asserted that those statements made by Agent Bonavolonta in support of the eavesdropping application (particularly the application before Owen, J. dated August 15, 1974) were incompatible with the statements contained in the affidavits offered in support of the search warrants. (This affidavit was dated

October 12, 1974). That is, incompatible to the extent that the statements contained in the applications for the eavesdropping warrants- regarding the likelihood of success of prior investigative techniques - appeared inconsistent with the conclusions and information contained in the search warrants.

The Government argued that even if the progenitor State wiretaps were in fact untimely sealed, the appellants Caruso and Annatone had no standing to challenge them. (A-399) They further asserted that the mere fact that they were utilized as the predicate probable cause for subsequent Federal taps did not vest the appellants with the ability to challenge their legality. The Court accepted this viewpoint, ruling that: "...they may not contest the Federal taps on grounds derived exclusively from alleged defects in the State taps as to which they are not 'aggrieved persons.' United States v. Wright, supra," (415 F.Supp at 849).

Notwithstanding the above noted position of the Court, the defendants asserted that they did in fact have standing; that the issue of standing was a question to be decided by State law (A-403) and; there existed substantial

State precedent to support their claim. (A-403)

They further averred that issues of standing aside, Section 700.65(3) of the New York Criminal Procedure Law created a statutory prohibition to the disclosure, in any criminal proceeding, of evidence obtained from eavesdropping tapes which had been untimely sealed. (A-423-425) Defendants contended that a sworn affidavit submitted during an exparte proceeding to obtain an eavesdropping order was in fact submitted during a "criminal proceeding." (A-424) These claims were rejected by the Court. (A-414)

Regarding defendants' claims under what has become known as the so called "Kalustian doctrine"[3/], it was asserted that the statements contained in support of the applications for the Federal wiretaps were wholly insufficient to satisfy the prophylactic requirements of 18 U.S.C. 2518 (1)(c). As in Kalustian, the statements contained in the subject affidavits appeared conclusory and lacking in specific factual information. The movants below claimed that this situation was further aggravated by the fact that the very affiant who stated that other investigative techniques would indeed be futile was able, a matter of a few weeks later, to submit an affidavit which was

3/ See, United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975)

so detailed and specific that a Federal District Court Judge found it supplied sufficient probable cause for the issuance of several search warrants. The Court nevertheless rejected defendants' claims as to the inadequacy of the 2518(1)(c) statements and their motions to suppress were in all respects denied.[4/]

As a result of the denial of their motions to suppress, defendants Caruso and Annatone entered a plea of guilty to Count Two of the subject Indictment. The instant appeal therefore addresses itself solely to the questions raised at the motion to suppress below.

STATUTES INVOLVED

I. Title 18, United States Code, Section 1955

§1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

4/ United States v. Caruso, 415 F.Supp. 847 (S.D.N.Y. 1976)

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

II. Title 18, United States Code, Section 2517(3)

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

III. Title 18, United States Code, Section 2518(1)(c)

§2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

IV. Title 18, United States Code, Section 2518(8)(a)

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other

alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

V. Section 1.20(18) New York Criminal Procedure Law

18. "Criminal proceeding" means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this State or of any other jurisdiction, or involves a criminal investigation.

VI. Section 700.20(2)(d) New York Criminal Procedure Law

2. The application must contain:

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

VII. Section 700.50(2) New York Criminal Procedure Law

2. Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions.

VIII. Section 700.65(3) New York Criminal Procedure Law

> 3. Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.

QUESTIONS PRESENTED

1. Whether the defendants-appellants possess standing to challenge the progenitor State wiretaps as well as the derivative Federal wiretaps; and further, whether the issue of standing is to be determined by the application of State or Federal Law?

2. Whether Section 700.65(3) of the New York Criminal Procedure Law, as its terms are defined by Section 1.20 of that statute, operates to prohibit the disclosure of evidence derived from eavesdropping tapes untimely sealed during an ex parte application for a subsequent eavesdropping warrant?

3. Whether sufficient factual information was contained in the affidavits in support of the Federal wiretaps to satisfy the prophylactic requirements of 18 U.S.C. 2518(1)(c).

POINT I

AN ANALYSIS OF THE LAW OF THE STATE OF NEW YORK REVEALS THAT APPELLANTS DO IN FACT POSSESS STANDING TO CHALLENGE THE PROGENITOR STATE WIRETAPS WHICH FORMED THE PREDICATE PROBABLE CAUSE FOR THE SUBSEQUENT FEDERAL WIRETAPS.

At the motion to suppress, defendants asserted that under the law of the State of New York they would possess standing to challenge the State wiretaps - even though such wiretaps may not have intercepted their voice or involved an instrument over which they possessed a proprietary interest - if those wiretaps were used to provide probable cause for subsequent wiretaps over which they were intercepted. (A-403) The threshold issue therefore is, whether standing is to be determined by State of Federal precedent.

The law of this Circuit appears well settled that in instances of interpreting and construing State wiretap orders it is State law which will control. See, United States v. Rizzo, 491 F.2d 215, 217 (2nd Cir. 1974); United States v. Manfredi, 488 F.2d 588, 598-99 (2nd Cir. 1973); United States v. Tortorello, 480 F.2d 764, 782-783 (2nd Cir. 1973); United States v. Capra, 501 F.2d 267, 275 (2nd Cir.1974).[5/] This rule is especially

5/ The only exception to this rule is that State law will not control in those instances in which the State wiretap statute appears less restrictive than Title III itself. United States v. Marion, 535 F.2d 697, 702 (2nd Cir. 1976) also see: 2 U.S. Code Cong. Adm. News, Senate Report #1097, page 2112 at 2187 (1968).

applicable in those instances where wiretapping orders have been obtained and used in a "joint" State and Federal investigation. As Judge Oaks of this Court noted in his opinion in United States v. Manfredi, supra:

> "While we encourage cooperation between Federal and State law enforcement agencies, we note that the Government, in allowing a joint investigation to proceed through the use of a State warrant, subjects itself to the risk that State courts may impose on such warrants and the evidence obtained under those warrants a higher standard than would a Federal court dealing with interpretation of the Federal wiretap statute." (488 F.2d at 598, note 7)

Appellants respectfully contend, in light of the foregoing authority, that it is State law which must control in determining whether these appellants had standing to challenge the legality of the State orders.

In this regard, the Court's attention is respectfully drawn to the following series of New York cases. From these cases has evolved the proposition that in instances where successive wiretaps are obtained - and where the predecessor warrants supply probable cause for subsequent warrants - a defendant's standing to challenge the early warrants, although he may not have been intercepted over them, will nonetheless be recognized. This doctrine finds particular support in those instances where eavesdropping is so pervasive that it is difficult to tell with any certainty when a defendant was

first subjected to electronic interception.[6/]

The facts extant in People v. Brown, 80 Misc. 2d 777, 364 NYS2d 364 (S.Ct. N.Y.Ct. 1975) posed a question of standing very similar to that raised at bar. In Brown a "...continuous series of eavesdropping orders for a succession of locations...were issued." "Conversations overheard after six months at [one location] were used to obtain warrants for eavesdropping which continued for the next six months at [a second location], which, in turn, led to the following two and a half months of interceptions in the backroom of the [third location]." (80 Misc. 2d at 778) The defendant sought to challenge the probable cause which underlay a State wiretap warrant issued on August 30, 1971. However, even though this August 30th warrant was characterized as the "progenitor of the series," Brown himself was not actually intercepted until almost 11 months later, on July 17, 1972.

6/ The present case presents just such a complex problem. Although the appellants do not challenge the good faith "information and belief" representations made by counsel for the Government, based upon the alleged scope of the enterprises itself and the facts that both DiTuri and D'Addario (intercepted on the "Bernstein" wiretap) allegedly reported through and assisted the appellant Caruso, there is strong circumstantial support that the appellant Caruso may indeed have been intercepted prior to the "Vacarrelli tap"(although his voice may not have been recognized.) See Appendix pages 429-431, 444.

The People contended that Brown lacked standing to challenge the legality of the August 30th warrant and therefore could not raise the claim that the wiretap over which he was actually intercepted was a tainted derivative fruit.

The Court rejected the People's contention and suppressed the eavesdropping evidence against Brown. Justice Roberts noted that:

> "To hold that Brown cannot attack his own interception on this basis without first demonstrating additional 'standing' to object to the illegality of its source would intolerably undermine the deterrent aim of the exclusionary rule and its companion principle that the State may not be permitted to profit from its own illegality. (Mapp v. Ohio, 367 U.S. 643). Such a holding would encourage Fourth Amendment violations which, though suppressible by some, could nevertheless insnare others whose timing - and the legalism of standing - would preclude them from objecting. It would reward illegality in proportion to its duration and expansion. Such result would be unconscionable." (80 Misc. 2d at 787)

Similar reasoning was applied by the Appellate Division, First Department in the case of People v. Koutnik, 44 AD2d 48, 353 NYS2d 197 (1st Dept., 1974). Koutnik also involved an expanded eavesdropping situation in which numerous defendants were intercepted at various times over a series of warrants. Many of the defendants did not possess "standing" to attack all one hundred and seven warrants. Nevertheless, the Court found that:

"[Although]...not all appellants may challenge all of the wiretap orders, and some may challenge none of them, each subsequent order is predicated on information obtained from previously authorized interceptions, and are so intertwined and interrelated as to cast a shadow upon the entire investigation. Thus,...we cannot reasonably conclude that its connection with the subsequent wiretap orders, and the discovery of the challenged evidence had 'become so attenuated as to dissipate the taint' (citations omitted); or that any lawfully obtained orders were not procured by exploitation of the first improperly granted order. (Citations omitted) Accordingly, the suppression motions should have been granted." (44 AD2d at 53)

In the case of People v. Amsden, 82 Misc. 2d 91, 368 NYS2d 433 (S.Ct. Erie County, 1975), Justice Doerr writing the opinion for the Court reached analogous conclusions concerning standing. In Amsden, evidence gleaned from conversations overheard on two wiretaps formed the basis for applications for further wiretaps. These wiretaps in turn finally provided the basis for applications for wiretaps over which the defendant Amsden's conversations were seized. The defendant, in his motion to suppress, sought to challenge "...the first two eavesdropping warrants (which did not concern him nor any of his conversations) upon which the later ones depend(ed)." The Court held that since the initial warrants were issued for offenses punishable by less than a year imprisonment and therefore were in controvention of 18 U.S.C. 2516(2), that all wiretaps must be suppressed.7/

7/ Appellants recognize that there is considerable precedent which contradicts the conclusion that wiretaps issued for the generic offense of gambling must, in addition, be issued for gambling offenses punishable by more than a year imprisonment. See People v. Di Figlia, 50 AD2d 709, 374 NYS2d 891

Assuming that this Court similarly concludes that the appellants Caruso and Annatone possess "standing" to challenge the predecessor State wiretaps, the major challenge raised to them is that they were untimely sealed. Both Article 700.50(2) of the New York Criminal Procedure Law and Section 2518(8)(a) of Title 18, require that "immediately upon the expiration of [a wiretap order] such recordings shall be made available to the Judge issuing such order and sealed under his direction." Insofar as this Court is well acquainted with the requirements imposed by these statutes (United States v. Gigante, 538 F.2d 502 [2nd Cir. 1976]), the sealing issue may be concisely presented.

Appellants herein challenge five of the State wiretaps on the grounds that they were untimely sealed and are therefore in derogation of State and Federal law. These are: 1. The so called "Whalen I" wiretap issued by Justice Sullivan, which terminated on November 25, 1973 and was sealed forty-three days later on January 7, 1974 (A-20). 2. The "Whalen II" tap issued by Justice Bloom, which terminated on November 25, 1973 and was sealed forty-three days later on January 7, 1974. (A-40) 3. The "Salomone Wiretap" issued by Justice Bloom, which ter-

7/ cont'd.
(4th Dept. 1975); United States v. Carubia, 377 F.Supp. 1099 (EDNY, 1974). However these decisions do not undermine the Courts holding with regard to standing.

minated on December 18, 1973 and was sealed twenty-three days later on January 11, 1974 (A-63). 4. The "Social Club" wiretap issued by Justice Bloom, which terminated on January 8, 1974 and was sealed twenty-four days later on February 1, 1974 (A-85). 5. The "G & D" wiretap issued by Justice Bernstein, which terminated on February 7, 1974 and was sealed forty-two days later on March 21, 1974 (A-102)

It is this succession of orders which appellants claim not only provided the probable cause for each other, but also provided probable cause for the subsequent "Federal" wiretaps.[8/] This claim is supported by the factual findings of the District Court. (United States v. Caruso, 415 F.Supp. 847, 849 [SDNY 1976]). The Court below held that the FBI had indeed "...made use of the results of the State intercepts to establish the 'probable cause' necessary to obtain three authorizations for Federal wiretaps from Judges Ward, Owen and Motley." (415 F. Supp. at 849).

8/ The "Federal wiretaps" refer to the "Expresso wiretaps" issued by Judge Ward (A-161); the "Rosewood wiretap" issued by Judge Owen (A-216) and the "Rosewood renewal wiretap" issued by Judge Motley. (A-254)

Since the lower Court initially ruled that only those defendants who were actually overheard on the State wiretaps could challenge their legality only the "Social Club" and the "G & D" taps were examined for purposes of assessing the Government's explanations for their late sealing. (A-414)

In an attempt to meet the Government's burden of demonstrating the legality of these surveillances, a single witness was presented.[9/] The Government's witness was John Breslin, a former Assistant District Attorney for Bronx County. Mr. Breslin was Bureau Chief in Charge of the Rackets Bureau at the time that the "Social Club" and the "G & D" wiretaps were conducted. He was ultimately responsible for the supervision and sealing of those tapes. Through the testimony of Mr. Breslin, the Government attempted to show that the conduct of the District Attorney's Office, in allowing a 24 day sealing delay (the "Social Club" wiretap) and a 42 day sealing delay (The "G & D" wiretap) could be excused.[10/]

9/ See United States v. Rizzo, 491 F.2d 215 (2nd Cir. 1974); People v. Malinsky, 15 NY2d 86, 91 - Note: 2, 262 NYS2d 65, 70 (1965).

10/ Section 700.65(3) of the New York Criminal Procedure Law provides in pertinent part that: "...the presence of the seal provided for by sub-division 2 of Section 700.50, or a satisfactory explanation of the absence thereof, shall be prerequisite for the use or disclosure of the contents of any communications or evidence derived therefrom." (Emphasis supplied). It was the Government's assertion that the facts adduced constituted such a "satisfactory explanation."

Mr. Breslin claimed that there were two reasons for the delay in sealing the "Social Club" wiretap. Firstly, he contended that "It was my understanding that in the intervening period, they were in the process of being duplicated by the Police Department." (A-442) The second reason offered was that there was continuing "investigative activity" and that the tapes were left unsealed so that they could be reviewed with an eye toward obtaining possible successive wiretap orders. (A-442)

As to the "G & D" wiretap, Mr. Breslin offered a somewhat different explanation for the sealing delay. Apparently the District Attorney's Office was informed that on or about February 9th or 10th, 1974, the Police had discovered that their surreptitious electronic interception had been compromised. Accordingly, the District Attorney's Office began an investigation to determine the source of this suspected "leak." (A445) The investigation continued until approximately the middle of March of that year. Mr. Breslin testified that he felt that the District Attorney who was handling the case, a Mr. Carroll, was overly troubled by the fact that a "leak" of this wiretap had occurred. Bothered by Mr. Carroll's concern, Mr. Breslin assigned him to another matter. (A-446)

> "Yes. As usually happens during a time like this in which there are - it does get ugly at times. Mr. Carroll was quite concerned. I think this was his first investigation, so I took a trial case away from another assistant and gave it to him and he embarked

on his first trial." (A-446)

At the completion of the trial District Attorney Carroll apparently entered Lenox Hill Hospital.[11/] Breslin, however, waited until the middle of March, 1974 and then realizing that Carroll would be out for "...an extended period of time and would be absent from the office for a few months, I assigned the case to another District Attorney by the name of Michael Lippman." (A-447) The tapes were finally sealed, forty-two days after the wiretap terminated, on March 21, 1974. (A-446-447)

The Court found that the above referred to explanations were sufficient to explain these protracted sealing delays.

> "...I decide and find that the delays in sealing the 'Social Club' taps were satisfactorily explained, did not derive from any purpose to obtain tactical advantages for the surveilling parties or the State Prosecutor, and no investigative benefits were sought or obtained by the delays. ...The delays encountered by the efforts by the Police to ready the tapes for sealing and to duplicate social club tapes and the internal discussions in the District Attorney's Office looking to continuance of the interception adequately explain and sufficiently justify, under the peculiar circumstances, the 24 day delay in sealing the social club tapes. (415 F.Supp. at 850)
>
> In respect to the G & D tapes, there was a tip-off to the targets of the tap, as the tape apparently confirms, resulting in a decision to terminate that tap before the date to which it had been authorized. The discovery of this misconduct brought on a flurry of excitement and confusion followed by the unexpected

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11/ Mr. Carroll entered the hospital on approximately February 24, 1974. (A-446)

hospitalization of the Assistant District Attorney in Charge and ultimately the re-assignment of the case to another District Attorney. In the course of picking up the threads, the later discovered that the tapes so terminated had not been sealed and he immediately cured the defect. (415 F.Supp at 850)

While the duration of this sequence of events, 42 days stretches the time periods of delay in sealing previously held to be satisfactorily explained, every case is sui generis. The sealing delay yielded no benefit to the surveilling authorities, was not sought for such a purpose, gave no one any tactical advantage and no tampering was either suspected or hinted or established in the premises by any party." (415 F.Supp at 851)

It is respectfully asserted that none of the reasons relied upon by the District Court have been found sufficient to excuse sealing delays. The thrust of the statute itself is to protect the integrity of the tapes and thereby protect those parties intercepted. Furthermore, precedent in this area does not require the defendants make any allegation as to tampering or alteration.[12/] In fact, with respect to the explanation of the late sealing of the "Social Club" wiretap, numerous cases have categorically rejected the concept that the Government may be dilatory in meeting its requirements under Section 700.50(2) simply because it is considering a continuing investigation or because its

12/ People v. Nicoletti, 34 NY2d 249, 253-254, 356 NYS2d 855, 857-858 (1974); People v. Sher, 38 NY2d 600, 381 NYS2d 843 (1976); United States v. Gigante, supra.

representatives tarry in duplicating the recorded material. As Judge Gorman in People v. Simmons, 84 Misc. 2d 749, 378 NYS2d 263 (S.Ct. New York County 1975), affirmed on the decision of Gorman, J., ____AD2d____, ____NYS2d____(1st Dept. 1976) held:

> "Here, the excuses tendered for the delay consist of the pendency of grand jury proceedings; the need to prepare inventories, duplicate recordings and transcripts; the statutory requirement that reports be completed; and the complexity and on-going nature of the investigation. These reasons are unacceptable." (378 NYS2d at 266)
>
> * * *
>
> "The urgency of preparing duplicate recordings is belied by the testimony that only two tapes were copied in May, 1974. A better procedure would have been to duplicate each tape as it was completed (People v. Blanda, 80 Misc. 2d 79, 80, 362 NYS2d 735, 738 [S.Ct. Monroe County, 1974]). Likewise for the preparation of transcripts, inventories and reports 'duplicate recordings could and should have been made and the originals preserved under seal' (People v. Nicoletti, 34 NY2d 249, 253-254, 356 NYS2d 855, 857-858, 313 N.E. 2d 336, 338-339 [1974]; also see CPL Section 700. 55 subd. 2 [sic]; 18 U.S.C. §2518 [8][a])." (378 NYS2d at 266)

In accord, see: People v. Washington N.Y.L.J. 12/9/76, page 12, Col. 1 (Second Dept. 1976); People v. Sher, supra; United States v. Gigante, supra; United States v. Gamaldi , ___F.Supp. ___ (SDNY, November 14, 1975); People v. Guenther, 81 Misc. 2d 258, 366 NYS2d 306 (Monroe County Court 1975).

As to the "G & D" wiretap it is respectfully asserted that the Court's conclusion that the 42 day sealing delay was adequately explained is likewise in error. The cross-examination of Mr. Breslin clearly demonstrates that the reasons

upon which the District Court attached in finding a reasonable explanation had little or no relationship as to why these tapes were untimely sealed.

Cross-examination by Mr. La Rossa:

"Q. Now, sir, the fact that there was an investigation into a leak with respect to the G & D luncheonette, that in no way prohibited you or members of the Police Department from sealing those tapes, did it?

A. Prohibit it?

Q. Yes.

A. No, sir.

Q. And there was no advantage in your keeping those tapes in your possession or the Police Department's possession in order to continue that investigation, isn't that right?

A. That's correct.

Q. They were not assisting or aiding you in that investigation, were they?

A. They were not.

Q. And whoever conducted that investigation into a purported leak never asked for the tapes or used them in any respect?

A. I have no idea of that.

Q. Isn't that correct, to your knowledge?

A. To my knowledge? No.

Q. So in effect, to break down your testimony with respect to the G & D tapes, in effect what happened here is somebody just forgot to seal them, isn't that right?

A. I would assume so.

Q. And it was based upon somebody's negligence in the office, isn't that correct?

A. I would assume so.

Q. With respect to the American Social Club, do you have any idea from the time of the termination of that order, which you told us, I believe, was January 8, 1974, until the date it was sealed, which was February 1, 1974, in whose possession those tapes were?

A. The question is, do I have an idea?

Q. No. Do you have knowledge?

A. That is a different question. No, I do not.

Q. Do you have any idea who had access to them during that period?

A. My information was the Police Department; specifically Captain Dillon had them in his possession at all times.

Q. Do you know whether or not they were duplicated?

A. Of my own knowledge, I do not know." (A-460-462)

The appellants contend that the District Court's reliance upon such excuses - as the need to prepare duplicates or the confusion which allegedly stemmed from a collateral investigation - to explain these delays, is misplaced. As Mr. Breslin testified, he did not even know if these tapes were being duplicated.(A-462) It was his clear statement that the collateral investigation was in no way an obstacle to the sealing of these tapes. (A-460) Rather the tapes remained unsealed through sheer neglect and misfeasance. (A-461) Accordingly, the appellants respectfully assert that the evidence derived from all subject wiretaps, to include the subsequent derivative Federal taps, should be in all respects suppressed.

POINT II

SECTION 700.65(3) OF THE NEW YORK CRIMINAL PROCEDURE LAW, AS ITS TERMS ARE DEFINED BY SECTION 1.20(18) OF THAT STATUTE, PROHIBIT THE DISCLOSURE OF EVIDENCE DERIVED FROM EAVESDROPPING TAPES IMPROPERLY SEALED DURING THE EX PARTE APPLICATION FOR A SUBSEQUENT EAVESDROP WARRANT.

Appellants contend that even if this Court were to conclude that they do not possess "standing" to attack the progenitor State wiretaps, Section 700.65(3) of the CPL nevertheless creates a statutory prohibition to the disclosure of the information contained on those tapes. Accordingly, if such disclosure were made in derogation of Article 700 any subsequent orders derived therefrom are rendered illegal and void.

Once again appellants assert that determination of this issue rests upon State, rather than Federal, law. The applicable statute being Section 700.65(3) of the New York Criminal Procedure Law. Subdivision 3 of this section provides in pertinent part that:

> "Any person who has received, by any means authorized by this Article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of Section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom." (Emphasis supplied)

It is therefore necessary to determine whether or not the submission of a sworn affidavit, during an ex parte wiretap application before a Federal District Court Judge, may be considered a "criminal proceeding" within the meaning of the New York CPL. Referring to the definitional section of this statute, one finds that Section 1.20(18) specifically defines a "criminal proceeding" as:

> "'Criminal proceeding' means any proceeding which
> (a) constitutes a part of a criminal action or
> (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this State or of any other jurisdiction, or involves a criminal investigation." (Emphasis supplied)

It is axiomatic that the ex parte application for an eavesdropping warrant, under the above stated definition, must be made at a "criminal proceeding." Firstly, it is unquestionably a "prospective" criminal action. One could not seriously assert that an application which alleges probable cause to believe that enumerated crimes are being committed by specified individuals does not "...relate[d] to a prospective... criminal action." Secondly, an ex parte application for an eavesdropping warrant must certainly "...involve a criminal investigation." Thus, under the terms of this section, appellants' assertion that the subject electronically seized evidence was disclosed during a "criminal proceeding," seems to be an incontestable proposition.

Parenthetically the fact that this application took place in a Federal District Court rather than a Court of the State of New York is, of course, of no moment since Section 1.20(18) specifically included proceedings "... either of this State or of any other jurisdiction... "

In litigation involving Sections 700.50(2) and 700.65(3) of the CPL, the New York Court of Appeals has uniformly held that these sections must be strictly construed. Judge Jasen, writing the decision for a unanimous Court in People v. Nicoletti, supra, held that:

> "The sealing requirement is to be strictly construed and it is not the defendants' burden to come forward with evidence of tampering when unsealed recordings are sought to be introduced into evidence. The purpose of this requirement is at least threefold: to prevent tampering, alterations or editing; to aid in establishing the chain of custody; and to protect the confidentiality of the tapes...of these, the first is perhaps of greater concern. Tape - recorded conversations lend themselves to 'diabolical fakery' (citations omitted) through skillful editorial manipulation, alterations maybe undetectable, or, if detectable at all, then only by the most sophisticated devices and techniques involving time-consuming and expensive analysis by technical experts. While not foolproof, sealing reduces the risk of such deliberate manipulations to tolerable limits." (34 NY2d at 253)

Similarly, in People v. Sher, supra, the Court stressed that "...the sealing requirement must be strictly construed. The need for rigid adherence to the statutory procedure is explained by the history of our present wiretapping provisions." (381 NYS2d at 845) In People v. Simmons, supra the Court

noted that:

> "The People cite United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40L Ed. 2d 380 [1974] in support of their theory that a procedural error need not result in suppression. That case is in opposite. As the United States Supreme Court pointed out, it is necessary to examine the 'statutory scheme' to ascertain constitutional intention (citations omitted) in Chavez, the application and court order incorrectly identified the authorizing official, although the proper official actually authorized the application. The Court concluded that the purpose of the statute was to fix responsibility and that objective had not been stymied (citations omitted). On the other hand, the legislative desire to insure the integrity of the tapes and limit the potential for abuse is automatically thwarted by a delay in sealing - not a factor in Chavez (citations omitted)." (378 NYS2d at 268)

In accord, see People v. Washington, supra; United States v. Marion, supra, at page 706; United States v. Gigante, supra, at page 505.

It is also noted that Article 700 of the New York CPL exists in derogation of the common law. This fact, in conjunction with the statutes interference with individual privacy and personal liberty, likewise compels a strict construction.[13/] An examination of the New York rules of statutory construction

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13/ See, In re Mayers, 9 Misc. 2d 212, 169 NYS2d 839 (Ct. of General Sessions, New York 1957); Tilbro Home Builders, Inc. v. Leidel, 42 AD2d 578, 344 NYS2d 614, rev'd on other grounds, 35 NY2d 347, 361 NYS2d 895 (1975).

established in McKinney's Consolidated Laws of New York, Book 1, Statutes, reveals that strict construction is prescribed for statutes in derogation of the common law:

> "The legislature in enacting statutes is presumed to have been acquainted with the common law, and generally, statutes in derogation or contravention thereof, are strictly construed..."

And, concerning statutes which operate to interfere with individual privacy or liberty, Section 311 points out:

> "A statute which infringes on common right is strictly construed."

It is therefore respectfully asserted that the unequivocal language of Section 700.65(3) must be given full force and effect.

Section 1.20(18) of the CPL, which defines a "criminal proceeding", first appeared in the 1968 Study Bill and Commission Report on the Commission on the Revision of the Penal Law and Criminal Procedure Law. This Study Bill, after lengthy public and legislative hearings, was enacted with certain modifications as the New York Criminal Procedure Law. (Chapter 996 of the 1970 Laws of the State of New York, effective September 1, 1971). Although Section 700.65(3) was similarly enacted as part of Chapter 996 of the 1970 Laws of the State of New York, this section was not contained in the 1968 proposed bill. As the legislative reports to the proposed Criminal Procedure Law point out:

"Since the submission of the Study Bill in 1968, with its article addressed to eavesdropping warrants, (F.Art. 370); the entire area of eavesdropping has been drastically effected by the requirements and limitations of Federal legislation on the subject, contained in a Federal bill colloquially known as the "Safe Street Act.' Accordingly, the final proposals article devoted to 'eavesdropping warrants' (F. Art. 700) is appreciably different from that of the Study Bill."

These facts are brought to the Court's attention to emphasize that the drafters of Article 700 were unquestionably aware of what a "criminal proceeding" was to be defined as when they wrote Section 700.65(3). It is obvious that when they specifically provided that tapes be properly sealed before the evidence contained thereon could be disclosed, they intended this restrictive and prophylactic requirement to protect the privacy of the citizenry of the State of New York. Its provisions may not now be disregarded.

It is clear that subdivision (3) of Section 700.65 operates to prohibit the disclosure of wiretap evidence, from tapes which were improperly sealed, during an ex parte application for a subsequent eavesdropping warrant. Should this Court conclude that the subject State wiretaps were indeed untimely sealed, the disclosure of any evidence derived therefrom renders all subsequent wiretap orders, which rely, in whole or in part, upon that information as a predicate for probable cause, void.

Wherefore, it is respectfully asserted that all subject eavesdropping evidence should be suppressed.

POINT III

FAILURE TO DEMONSTRATE, IN THE AFFIDAVITS IN SUPPORT OF THE SUBJECT WIRETAPS, THAT OTHER INVESTIGATIVE TECHNIQUES HAD BEEN TRIED AND FAILED OR WERE REASONABLY UNLIKELY TO SUCCEED, REQUIRES THE SUPPRESSION OF ALL ELECTRONICALLY SEIZED EVIDENCE.

The instant case demonstrates that although Title III was designed to impose rigorous conditions before court ordered eavesdropping would be sanctioned, these conditions are often times ignored by law enforcement officials. 18 U.S.C. 2518(1)(c) requires, as an indespensible pre-condition to the issuance of an eavesdropping warrant, that the Government make:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed or to be too dangerous."

The Government below asserted that the affidavits submitted by FBI Agent Julius J. Bonavolonta, proffered in support of the "Federal wiretap" orders, satisfied the requirements of this Section. However, an examination of the relevant portions of those affidavits reveal nothing more than what have become "boiler plate" conclusory statements which, with very slight variation, can be found in virtually every wiretap application of its kind.

Initially it is noted that the "Motley affidavit", which was an application to extend the so-called "Rosewood" tap, (originally issued by Judge Owen) contained no updated information whatsoever concerning other investigative techniques. Simply because this was an affidavit in support of an application to extend the duration of an existing wiretap installation, this fact does not release the Government from meeting the requirements set forth in Title III. Nevertheless, other than the mere verbatim recitation of the language of 2518(1)(c) itself, no further information was supplied to the Court. It is asserted that to accept a barren statement concerning other investigative techniques, without sufficient factual underpinning in support thereof, is offensive to Constitutional standards.

The affidavit in support of the "Owen" wiretap did contain some information regarding the potential of success of other investigative techniques. However, what facts were set forth were so sparse and the assertions so conclusory that this affidavit, too, failed to satisfy the threshold requirements of 2518(1)(c). For example, the affidavit states:

> "I have learned through my experience and the experience of other agents and officers previously described who have investigated gambling operations that gamblers usually do not keep permanent records.
>
> " Furthermore, even if such records are maintained temporarily, gamblers often are able to destroy

> them immediately prior to or during a physical search. Additionally, when such records have been seized in the past, generally, they have been insufficient to establish all elements of Federal offenses because they are difficult to interpret and are of little or no significance without more complete knowledge of the gamblers' activity and method of operation." (A-250-251)

Not only does the above cited excerpt consist of almost entirely conclusory allegations but much of the information, as Appellants will later demonstrate, was subsequently contradicted by an affidavit which Agent Bonavolonta submitted in support of search warrant applications. Furthermore, the claim that records alone would not disclose the "...gamblers' activity [or] method of operation..." is disingenuous. At the time this affidavit was written there can be little doubt that the F. B. I. had complete knowledge of the activity of this gambling "combine".

Similarly disingenuous is the statement:

> "...I also know from experience that a large scale gambling operation, such as the one described previously, utilizes numerous 'banks' and 'wire' rooms with different employees. The detection of such locations in itself does not disrupt the overall operation." (A 251)

Once again it is clear at this time both the New York City Police Department and the Federal Bureau of Investigation knew of virtually all such "wire" rooms and "banks". Indeed, the individuals named in the wiretap order were frequently observed leaving these premises with "paper bags"

and "envelopes" which the F. B. I. had concluded contained records and indicia of gambling. (A 376-378)

Finally, Agent Bonavolonta states:

> "The informant previously mentioned hereinabove, Mr. A, is unwilling to testify in this matter because of fear for his phsyical safety." (A-250)

As this Court will undoubtedly observe, there is an alarming frequency with which such statements appear in wiretap affidavits. It is suggested that to compromise the identity of a single informant, rather than to invade the privacy of numerous individuals through extensive electronic monitoring, may well be the preferred course of conduct.

Finally, the affidavit indicates that:

> "Seizure of records, even if successful, probably would not be an adequate measure. My experience and the experience of other agents of the Federal Bureau of Investigation and members of the New York City Police Department has shown that raids of gambling establishments and searches of gamblers in the past have not resulted in the gathering of sufficient physical or other evidence to prove all elements of federal offenses or the complete nature and scope of a gambling operation."

In the instant case this Court is provided with even further proof of the insincerity of the above wiretap affidavit. The Court is respectfully asked to compare the averments of Agent Bonavolonta, made only a matter of weeks later, in support of applications for

physical search warrants.[14]/

"There is probable cause to believe that evidence of the commission of the aforesaid crimes (18 U.S.C. §1955) and property which has been used, is designed for and is intended for use in the commission of said crimes, to wit, records of the illegal gambling enterprises, papers, slips and devices utilized to accept, record and compute wages and monies owed to and by bettors and other participants in the illegal gambling business; records, papers, slips and devices utilized to identify participants in the illegal gambling business, United States currency, telephone lines and instruments and other gambling paraphernalia used to further the said illegal gambling business, will be found on the premises and the persons captioned above." (Appellant Frank Caruso is one of those persons so captioned).

"The investigation also reveals that DITURI reports to FRANK CARUSO who is the manager of the gambling business and who is assisted by ROBERT D'ADDRIO. As a control center for the combine CARUSO and D'ADDRIO utilized the premises of the ROSEWOOD LUNCHEONETTE, located at 3263 White Plains Road, which is also regularly visited by MICHAEL GAGLIANO and other participants in the gambling enterprise whose identities are as yet unknown. The investigation further reveals that records and other property used in the operation of the gambling business are maintained by participants at the premises of both MIKE'S EXPRESSO and the ROSEWOOD LUNCHEONETTE..." (A 368)

* * *

"Additional observation on the aforementioned dates

14/ This affidavit is dated October 11th, 1974. It is further noted that the "Motley renewal" wiretap did not expire until October 13th, 1974.

reveal that CARUSO, D'ADDRIO, GAGLIANO, and others as yet unknown have entered or left the premises with paper bags or envelopes. Based on my training and experience in investigating illegal gambling businesses (which has many times disclosed the use of paper bags and envelopes, in similar circumstances, to carry gambling records) and this business in particular, I believe that these bags and envelopes contained the records ('work' and 'ribbons') used in and maintained by the gambling combine." (A 376)

* * *

"On September 30, 1974 Special Agent Smith observed CARUSO, D'ADDRIO and GAGLIANO each enter the premises while carrying a brown paper bag." (A 377)

Although the Court below felt that the affidavits in support of the Federal wiretaps were sufficient to meet the requirements established by this Court in United States v. Steinberg, 525 F. 2d 1126 (2nd Cir., 1975) appellants respectfully contend that the affidavits were wholly insufficient. In fact, in Steinberg, Judge Van Graafeiland made it quite clear that this Circuit would not continue to countenence inadequate explanations concerning the failure of other investigative techniques.

"While the government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supply." (525 F. 2d at 1130)

In addition, the court in Steinberg (supra) noted that "...individuals dealing in large quantities of narcotics

are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel..." and: "...on oral argument appellants could advance no logical alternative to wiretapping to ascertain the details of Steinberg's operation." (525 F. 2d at 1130).

Turning to the crimes which were alleged at bar, that is violations of 18 U.S. C. §1955, one finds that the following elements must be proven by the Government to establish a prima facie case. The accused must conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. The statute defines illegal gambling business as one which (1) is in violation of the law of the state in which it is conducted, (2) involves five or more persons, (3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2000 in a single day.

The question is then presented whether these elements could have been established by the use of other than electronic surveillance. Certainly the presence and participation of five or more people would not have been difficult to prove by alternative means. The visual observations alone would have been sufficient to satisfy that requirement. Secondly, the fact that the

gambling enterprise had been conducted for a continuous period of thirty days was likewise a relatively easy matter to prove. Once again, the observations of the premises for which the physical search warrants were executed clearly show that gambling activity had taken place there for many months. Thirdly, to establish that gambling activity in violation of State law was being conducted, a raid or physical search of any of the premises which were known to be "wirerooms" or "policy banks" would have satisfied that element.[15/]

The reason that wiretapping, as opposed to traditional investigative techniques, was utilized in the instant case was that it was the easiest and most expeditious method by which the Government could obtain evidence against these defendants.[16/] The infiltration of a gambling operation, since it necessitates the participation of so many individuals, bettors as well as operators, has not historically presented an impossible law enforcement task. Unlike a closely knit narcotics conspiracy

15/ Also a search of one of these "paper bags" which the F. B. I. claimed contained "ribbons" of the day's gambling take might well have established the "$2000 in a single day" element.

16/ As this Court observed in United States v. Marion (supra) at 707 "The frequency with which wiretap applications are granted suggest that this result will neither cripple the Government's efforts to engage in electronic surveillance, nor tie its hand in the fight against crime." (Emphasis added)

where the principals impose much stricter security (for many reasons, among others,that the penalties for violations of these laws are quite severe), those involved in illegal gambling activities do not usually operate in such a clandestine fashion.

As the Court in United States v. Kalustian, 529 F. 2d 585 (9th Cir., 1975) observed:

> "The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance..." (529 F. 2d at 589)
>
> * * *
>
> "The Government's position is further undermined by the activity of other crime-fighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes." (529 F. 2d at 590)

. ' .In light of the conflicting affidavits submitted by the same F. B. I. agent the Government may not claim bona fide compliance with Title III. Section 2518(1)(c) was enacted so th t wiretapping would hopefully not become too excessive. It was the aim of Congress to see that wiretapping was the last alternative rather thar the first. Requiring that the Government demonstrate that all other investigative techniques have been exhausted, or would

otherwise prove unsafe or useless, and that wiretapping remains the only way to unearth specific activity, is demonstrative of the Legislative conscience that wiretapping is a severe invasion of a citizen's privacy.[17/]

It is respectfully asserted that the affidavits submitted in this case are totally insufficient to satisfy the mandate of 2518(1)(c).

Wherefore, for the foregoing reasons it is respectfully requested that an order of this Court issue suppressing all electronically seized information.

17/ As Justice Brandeis warned in Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564 (1928)(dissenting) "Writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgments of Convictions herein should be reversed, that subject wiretap evidence suppressed and the Indictments dismissed.

Respectfully submitted,

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Service of ~~three~~ 2 copies of the within
is admitted this 23rd day of December 1976

COPY RECEIVED
DEC 23 1976
ROBERT B. FISKE JR.
SO. DIST. OF N.Y.

UNITED STATES ATTORNEY FOR THE
SOUTHERN DISTRICT